

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DEMETRIUS BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 04-379E
	)	
U.S. JUSTICE DEPARTMENT,	)	JUDGE MCLAUGHLIN
BUREAU OF PRISONS, FCI MCKEAN	)	MAGISTRATE JUDGE BAXTER
WARDEN JOHN J. LAMANNA,	)	
REGIONAL DIRECTOR D. SCOTT	)	Electronically Filed
DODRILL, MEDICAL DIRECTOR,	)	
DIRECTOR HARLEY G. LAPPIN,	)	
	)	
Defendants.	)	

**DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED  
COMPLAINT OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rules 12(b)(1), 12(b)(6) and 56(c) of the Federal Rules of Civil Procedure, defendants the U.S. Justice Department, Bureau of Prisons, FCI McKean, Warden John J. LaManna, Regional Director D. Scott Dodrill, Medical Director Newton E. Kendig and Director Harley G. Lappin, by their undersigned counsel, file the following Motion to Dismiss Plaintiff's Second Amended Complaint or, in the Alternative, Motion for Summary Judgment, and in support thereof state as follows:

1. *Pro se* prisoner Demetrius Brown filed a Complaint in this action under the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, alleging personal injuries caused by his exposure to second-hand smoke or Environmental Tobacco Smoke ("ETS") during his incarceration at a federal prison located in McKean County, Pennsylvania ("FCI McKean").

2. Plaintiff later filed a Second Amended Complaint, in which he added a claim pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging violations of his rights under the Eighth and Fourteenth Amendments to the Constitution. Specifically, plaintiff alleges that defendants violated his constitutional rights by implementing and/or carrying out FCI McKean's smoking policy, denying his request not to be exposed to ETS, and allegedly "fail[ing] to curb non-compliance for indoor . . . smoking beyond those times specified by policy." (See 2d Am. Compl., ¶¶ 11-14.) Plaintiff's Second Amended Complaint does not allege damages or specify the relief sought

3. However, the Court should dismiss plaintiff's claims for multiple, independent reasons. To begin with, all of plaintiff's claims accruing before December 28, 2004 are barred by the applicable statutes of limitations. Moreover, plaintiff's *Bivens* claims should be dismissed for the following reasons: (i) plaintiff's constitutional claims against the "U.S. Justice Department," the Bureau of Prisons and FCI McKean are barred by sovereign immunity; (ii) defendants LaManna, Dodrill, Lappin and Kendig should be dismissed because there is no allegation that the personally violated plaintiff's constitutional rights; and (iii) plaintiff cannot prove that his alleged exposure to ETS rises to the level of a constitutional violation. As for plaintiff's FTCA claims, they should be dismissed on the following grounds: (i) the United States is the only proper party to an FTCA claim; (ii) plaintiff's allegations fall squarely within the discretionary function exception to the FTCA; and (iii) plaintiff cannot demonstrate that he suffered an actual injury caused by secondhand smoke.

4. Accordingly, the Court should dismiss plaintiff's Second Amended Complaint with prejudice or, in the alternative, enter summary judgment in favor of defendants.

5. Defendants' Brief in Support of this Motion, together with accompanying Exhibits 1 through 7, are incorporated in this Motion by reference.

WHEREFORE, defendants respectfully request that the Court issue an order granting its motion and dismissing plaintiff's Second Amended Complaint with prejudice or, in the alternative, entering summary judgment in defendants' favor as to all claims contained therein.

A proposed order is attached.

Respectfully submitted,

MARY BETH BUCHANAN  
United States Attorney

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Counsel for defendants

Dated: February 5, 2007